Feldkamp Enterprises, Inc. *and* Sheet Metal Workers International Association, Local Union No. 24, AFL–CIO. Cases 9–CA–33047 and 9–CA–33510–1, –2

July 11, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

The issues in this case[1] are whether the judge correctly found that the Respondent committed several violations of Section 8(a)(1) and (3) of the Act. The National Labor Relations Board has considered the decision and the record in light of the exceptions[2] and briefs and has decided to affirm the judge's rulings, findings,[3] and conclusions[4] and to adopt the recommended Order as modified and set forth in full below.[5]

ORDER

The National Labor Relations Board orders that the Respondent, Feldkamp Enterprises, Inc., Cincinnati, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating any employee about support for, or activities on behalf of, the Union.

(b) Warning, discharging, threatening, or otherwise discriminating against any employee for joining, supporting, or engaging in activities on behalf of the Sheet Metal Workers International Association, Local Union No. 24, AFL–CIO, or any other union.

(c) Threatening any employee that jobs and benefits will be lost, that the Company or any of its departments will close, or that operations will cease if they designate the Union as their collective-bargaining representative.

(d) Creating the impression that employees' protected concerted activities are under surveillance.

(e) Promising any employee that a pay raise will be given if the Union is defeated in an election.

(f) Denying pay raises while implying they will be granted if the Union is defeated.

(g) Promulgating, maintaining, and enforcing a no-solicitation rule which prohibits employees from discussing union or other protected, concerted activities during their nonworking time.

(h) Intimidating an employee by questioning him about wearing a hard hat bearing a union label and requiring him to supplant it with another hard hat bearing the company label.

(i) Implying that it is futile to vote for the Union as the Respondent will never agree to engage in collective bargaining.

(j) Granting an improved term of employment by changing the method of distributing wages.

(k) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Hayes Steele full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Hayes Steele whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the judge's decision.

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[1] On December 30, 1996, Administrative Law Judge Arline Pacht issued the attached decision. The Respondent filed exceptions and a supporting brief. The Charging Party and the General Counsel filed answering briefs.

[2] No exceptions were filed to the following unfair labor practices found by the judge: Superintendent Thompson's interrogation and job loss threat; Vice President Chadd Feldkamp's impression of surveillance; Superintendent McDonald's threats of mass terminations and plant closure; Superintendent Thompson's threat of job loss; Supervisor McDaniel's confirmation of plant closure threat; threats of job loss and plant closure and interrogations by Service Department Chief Howard and Superintendent McDonald; Supervisor DeWald's threat of job loss and futility of bargaining; warnings to employee Fraley; and the promulgation of an overbroad no-solicitation rule.

[3] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We also find without merit the Respondent's allegations of bias on the part of the administrative law judge. After full consideration of the record and the judge's decision, we perceive no evidence that the judge made prejudicial rulings or demonstrated bias against the Respondent.

[4] We adopt the judge's finding that the Respondent's president, Beau Feldkamp, threatened employees with job loss by stating that if the Union won the election, they would lose their jobs to union members and end up on the "books" (i.e., available for employment, but not working). We find no need to pass on the Respondent's exception, inter alia, to the judge's finding that Feldkamp made this statement on May 11. The statement was unlawful, whether made on May 11 or on a later date that month. We also find no need to pass on the judge's finding that Feldkamp unlawfully threatened job loss when he asserted at an employee meeting on May 31 that unionization would cause the Respondent to lose 30 percent of its business. In light of our affirmance of other findings of unlawful threats of job loss, an unfair labor practice finding based on this incident would be merely cumulative and would not affect the remedy in this case. For the same reason, Member Fox also finds it unnecessary to pass on the alleged May 11 threat of job loss by Beau Feldkamp.

[5] We shall modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

(c) Within 14 days from the date of this Order, remove from its files any reference to Hayes Steele's unlawful discharge and to warnings issued to Steele and Ray Fraley, and within 3 days thereafter notify these employees in writing that this has been done and that the discharges and warnings will not be used against them in any way.

(d) Rescind or modify any rule which prohibits employees from discussing union matters or engaging in solicitation for purposes protected by Section 7 of the Act during nonworking times.

(e) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facilities in Cincinnati, Ohio, copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 28, 1995.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT coercively question you about your union support or activities.

WE WILL NOT warn, threaten, discharge, or otherwise discriminate against any of you, or members of your family, for supporting Sheet Metal Workers International Association, Local Union No. 24, AFL–CIO or any other union.

WE WILL NOT threaten that you will lose your jobs or benefits, that the Company or any part thereof will close, or business operations will cease if you support a union.

WE WILL NOT imply that your union activities are under surveillance.

WE WILL NOT promise or withhold pay raises or other benefits on condition that you vote against or withdraw support from any union.

WE WILL NOT promulgate, maintain, or enforce a no-solicitation rule which prohibits you from discussing the Union or other protected activities during nonworking time.

WE WILL NOT discourage or prevent you from wearing union insignia, emblems, or labels and WE WILL NOT insist that you wear a Feldkamp label.

WE WILL NOT imply that voting for union representation is futile because Feldkamp Enterprises will never engage in collective bargaining with any union.

WE WILL NOT alter, improve, or withdraw any term or condition of employment because you engage in union or other protected, concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of rights guaranteed you under Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Hayes Steele full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Hayes Steele whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to Hayes Steele's discharge and to the warnings issued to Hayes Steele and Ray Fraley, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the warnings will not be used against them in any way.

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL rescind or modify the rule prohibiting employees from discussing the Union or engaging in other discussions protected by Section 7 of the Act during nonworking times.

FELDKAMP ENTERPRISES, INC.

Theresa L. Donnelly, Esq., for the General Counsel.
Fred A. Ungerman Jr., Esq. and *Kevin Walsh, Esq.*, for the Respondent.
Jerry A. Spicer, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

ARLINE PACHT, Administrative Law Judge. Pursuant to charges filed by the Sheet Metal Workers International Association, Local Union No. 24, AFL–CIO,[1] on the dates noted below, a second consolidated complaint issued on April 4, 1996, in this proceeding alleging that the Respondent, Feldkamp Enterprises, Inc.,[2] violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act).[3] The Respondent filed a timely answer denying the allegations in the consolidated complaint.

This matter was tried in Cincinnati, Ohio, on May 6–8, 1996. At the outset of the hearing, counsel for the General Counsel[4] moved to dismiss the complaint in Case 9–CA–33616, conditioned on the Respondent's payment of sums due to two alleged discriminatees named in paragraph 6 of the second consolidated complaint.[5] Counsel also moved to correct the date set forth in paragraph 5(c)(4) of the complaint from June 11 to 21, 1995, and amend paragraphs 5(c)(5) and (6) by alleging that on June 21, 1995, Richard Howard interrogated an employee about his union sympathies, and on May 31, 1995, threatened employees with job loss if they selected the Union as their bargaining agent. The respondent did not oppose amending the complaint, but denied the substantive allegations. Subsequently, on July 11, 1996, the General Counsel submitted a motion to amend complaint by adding the following allegation:

> On September 21, 1995, Respondent, by Beau Feldkamp, and renewed by Kevin and Rob Bush on November 9, 1995, promulgated and thereafter maintained, an unlawful no-solicitation rule, prohibiting discussions concerning the employees' break time to discourage union activities.

Because the proposed amendment addresses a matter closely related to other allegations in the complaint, and was fully litigated at the hearing, the motion to amend is granted nunc pro tunc.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to argue orally. Thereafter, the General Counsel, Charging Party, and Respondent filed posthearing briefs which I have considered carefully. On the entire record[6] in this case, and from my observation of the witnesses and their demeanor, I reach the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a corporation, has been engaged in the building and construction industry as a sheet metal contractor operating from its Cincinnati, Ohio facilities. During the past 12 months, in conducting its business operations, the Respondent purchased and received at its Ohio jobsites, goods valued in excess of $50,000 directly from suppliers located outside the State of Ohio. Accordingly, the complaint alleges and I find that the Respondent is and has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

At all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

II. THE UNFAIR LABOR PRACTICES

A. *Introduction*

The Respondent, Feldkamp Enterprises, Inc., has been doing business as a sheet metal contractor since 1976 when James "Beau" Feldkamp (BF) succeeded his father, James Feldkamp Sr., as president of the Company. BF's brothers, Jonathan (Jody) and Chadd, serve as the firm's vice president and junior assistant vice president, respectively.

The Respondent is engaged in the following operations at its three Cincinnati facilities: ducts are fabricated at a plant on Beckman Street, ventilation hoods are produced at a building located at 603 Burns Street, while a service department and administrative offices are housed nearby at 612 Burns Street. The Respondent deploys a work force of approximately 80 field and shop employees to some 20 different jobs running simultaneously.

In March 1995,[7] Feldkamp employees began an organizing campaign under the auspices of Sheet Metal Workers Local 24. A representation petition on behalf of all sheet metal workers and service technicians was filed on May 18.[8] Thereafter, the parties agreed to an election date of June 29.

The General Counsel contends that soon after the union campaign began, the Respondent initiated a countercampaign marred by extensive unfair labor practices, including surveillance, interrogations, threats that benefits and jobs would be

[1] Hereinafter referred to as the Union or Local 24.

[2] Hereinafter, the Respondent, Feldkamp, or the Company.

[3] The original charge in Case 9–CA–33047 was filed on June 28, 1995, and a complaint issued on October 2, 1995, to which the Respondent filed a timely answer. Thereafter, additional charges were filed on January 11, 1996, in Cases 9–CA–33510–1 and 2, which were amended on January 24 and 31; the original charge in Case 9–CA–33510–3 was filed on January 26, 1996, and on February 16 another original charge was filed in Case 9–CA–33616. On April 1, 1996, an order consolidating cases issued which was superseded on April 4 by the second consolidated complaint.

[4] Hereinafter referred to as the General Counsel.

[5] A final motion to dismiss has not been submitted yet to the court.

[6] Documents offered into evidence by the General Counsel are designated as G.C.Exh. followed by the appropriate exhibit number; those offered by the Respondent are marked R. Exh. and the Charging Party as C. Exh. References to the transcript are cited as Tr. followed by the relevant page number.

[7] Unless otherwise noted, the events described in this decision took place in 1995.

[8] See Case 9–RC–16566.

lost if the Union prevailed, and promises of benefits if it did not. In addition, the complaint alleges that the Respondent engaged in discriminatory conduct violative of Section 8(a)(1) and (3) of the Act by disciplining employee Ray Fraley and discharging employee Hayes Steele because of their union activities. The Respondent admits some of the charges and denies others, arguing that a number of the allegedly unlawful statements were protected expressions of opinion, or attributed to employees who are not supervisors or agents. Additionally, the Respondent contends that its disciplinary decisions with respect to Fraley and Steele were justified by their misconduct. The unfair labor practice allegations at issue in this case blocked the conduct of the election.

B. *Respondent's Supervisors and Agents*

Before discussing the unfair labor practice allegations in this case, it will be useful to resolve threshold questions regarding the status of certain Feldkamp personnel. During the hearing, the Respondent admitted that BF, Jody, and Chadd were supervisors under Section 2(11) of the Act. The supervisory status of Service Manager Rick Howard and Superintendents Bill Thompson and Kevin Bush also was admitted. However, the Respondent denies that BF's father, James Feldkamp Sr., and Foremen Guy DeWald and Larry McDaniels are supervisors or agents within the meaning of the Act.

Findings as to DeWald's and McDaniels' supervisory status

Section 2(11) defines a "supervisor" as an individual who, in the employer's interests, has the authority to:

> hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

To come within this definition, an employee need exercise only one of the functions described since they are written in the disjunctive. See *DST Industries*, 310 NLRB 957, 958 (1993). The evidence bearing on McDaniels' and DeWald's responsibilities indicates that they qualify as statutory supervisors.

McDaniels is the job shop foreman; DeWald has been duct shop foreman for the past 10 years. Both are veteran Feldkamp employees, each having accumulated approximately 20 years' experience. Both earn considerably higher hourly wages than any other employee in their shops. They also receive handsome annual bonuses which are similar in amount to those awarded to admitted supervisors and much greater than those awarded to rank-and-file employees. Both men occupy small offices. They attend regular weekly meetings with others who are admitted supervisors and members of management and report on the progress of work performed in their shops. Both operate with virtually no oversight from other senior personnel. If they did not exercise supervisory authority, there would be no one to oversee the work produced in their departments. On occasion, they request and usually are granted authority by one of the Feldkamps to assign overtime work to employees in their shops.

McDaniels acknowledged that he is solely responsible for maintaining and monitoring production. To this end, he assigns work to the eight employees in the shop, orders their supplies, reviews their timesheets, and examines their work product to insure that it is finished before it leaves the production area. When employees take leave, whether for illness or vacation, or if they arrive late to work, they are expected to clear the matter with him.

Like McDaniels, DeWald has the title of foreman, but was less forthcoming than his counterpart in describing his duties. He stated that he devotes a significant amount of time to transposing drawings received from the drafting department into written form, but then gives that work to another employee, Jack Baltrusch, who distributes it among the 10 to 14 employees assigned to the duct shop. DeWald, like McDaniels, also has a small office equipped with a table, chair, and telephone which he uses to dispatch truckdrivers to the field on a first-come, first-served basis, take requests from field superintendents, or discuss drawings when questions arise.

BF offered additional insights as to the powers which DeWald and McDaniels possess. Thus, he acknowledged that they have the authority to assign work to employees, and to direct and monitor them in performing their jobs. However, DeWald stated that he prefers not to exercise this authority, deferring instead to Baltrusch who has worked for the Respondent almost as long as he has. However, DeWald earns $21 per hour whereas Baltrusch's hourly rate is only $13. Dewald denied that he evaluates employees. Yet, when evaluations are prepared, DeWald acknowledged that BF seeks his opinion about the individual's performance. Surely, DeWald would not be asked to do this if he did not have substantial opportunity to observe the employees and sufficient skill to assess the quality of their production.

Significantly, BF stated that DeWald and McDaniels "run" their shops. He also conceded that they have the authority to recommend the discharge of employees, advice he would follow under most circumstances. Based on all of the above, the record evidence establishes that DeWald and McDaniels possess one, if not more, of the indicia needed to invest them with supervisory status as defined in Section 2(11). *DST Industries*, supra at 958.

Conclusionary findings as to the agency status of James Feldkamp Sr.

It is important to note that the complaint alleges that various individuals are supervisors or *agents* of the Respondent. (Emphasis added.) Although James Feldkamp Sr. is semiretired, he remains the Respondent's agent pursuant to Section 2(13) of the Act.

In determining whether an individual meets the definition of an agent, common law rules of agency apply. See *Allegheny Aggregates*, 311 NLRB 1165 (1993). Under the doctrine of apparent authority, an agency relationship exists where a principal supplies a third party with a reasonable basis to believe that the alleged agent is authorized to do the acts in question. Id.

The Board often concludes that close family members, like the senior Feldkamp, are cloaked in the mantle of apparent

authority. See *Emery's Tin Shop*, 306 NLRB 693 (1992). Feldkamp and his wife previously owned the business. Although he ceased serving as the Respondent's chief operating officer in 1994, the employees have not been apprised of this change. Given his former position and his parental relationship to the Company's three principal officers, the employees had good reason to regard the senior Feldkamp as the Respondent's agent.

C. *Independent 8(a)(1) Findings of Fact and Legal Conclusions*

The relevant facts and legal conclusions for each of the alleged violations of Section 8(a)(1) are detailed below in chronological order. The designation before each subsection refers to a numbered paragraph in the complaint.

5(a)(1)—Interrogation and threats of job loss by Bill Thompson

James Bucher, a Feldkamp employee since 1987, testified without dispute, that during a telephone call in April, Superintendent Bill Thompson turned the conversation to the Union, asking him whether he was pro- or antiunion. When Bucher answered that it did not matter to him as long as he was employed, Thompson cautioned that it should matter because a union victory could mean he would be out of a job.

This same conversation was repeated several weeks later when Thompson again asked Bucher if he favored the Union. Bucher continued to express indifference, prompting Thompson to repeat his warning that it did matter since his job could be on the line.

Thompson's remarks clearly were unsolicited and constitute unwelcome interrogation and threats of job loss. Bucher neither initiated the inquiry nor identified himself as a union adherent. His evasive answers suggest that he found Thompson's inquiries unwelcome and unsettling. Moreover, Thompson failed to assure Bucher that he would suffer no reprisals by answering his questions. The only warning he gave was coercive—that a union victory could lead to the loss of Bucher's job. As alleged in the complaint, Thompson interrogated and threatened Bucher with loss of his job in violation of Section 8(a)(1). See *Oster Specialty Products*, 315 NLRB 67 (1994).

5(b)(i), (ii), and (iii)—Beau Feldkamp's unlawful statements at May 11 meeting[9]

Ray Fraley, a Feldkamp employee since 1990, actively supported the Union; attending Local 24 meetings, distributing authorization cards and other union literature to his coworkers, and discussing various labor issues with them.

Fraley testified at some length about a series of mandatory, companywide meetings which the Respondent held with the employees during the union campaign. In describing the first of these meetings on May 11, Fraley stated that BF warned the assembled workers that if the Union won the election, they would lose their jobs to union members and end up on the books (i.e., available for employment but not working). He also cautioned the men that a union victory would mean that the benefits they currently enjoyed, including a 401K plan, paid holidays, vacations, and overtime would disappear, since the Union did not provide them.[10]

Greg Parriman and George Henderson, Feldkamp employees since 1983 and 1980 respectively, corroborated Fraley's testimony. Parriman related that BF said the Company would lose business and the number of jobs would decline if the Union prevailed. He and Henderson both recalled that BF told the workers they would lose their benefits if they opted for union representation. Fraley's nephew, employee Hayes Steele, remembered that BF commented that 80 employees were on the payroll at the time, whereas only 18 were employed when the Company was under a union contract. Henderson heard BF state that Respondent employed 80 workers, but if the Union won the election, only 10 or 12 would remain.

BF denied ever threatening any employee with the loss of his job, a claim which the Respondent contends is more worthy of belief than Fraley's accusation to the contrary. If only BF's and Fraley's testimony were being weighed, the task of assessing credibility might be difficult. However, it is not necessary to pit their statements against each other for Parriman and Henderson confirmed Fraley's version. The testimony of these witnesses is especially credible, for they jeopardize their economic well-being by contradicting their employer with proof of his wrongdoing while remaining in his employ, They jeopardize their economic well being, a risk not lightly undertaken.[11] BF may not have threatened specific employees with discharge. However, by predicting a decrease in business and reduction in jobs should the Union prevail, under the guise of discussing business realities, he succeeded in threatening the entire work force. Few threats are more devastating than those by an owner-manager which forecast discharge. BF's remarks did just that. As such, they constitute a flagrant violation of Section 8(a)(1).

BF maintained that when he addressed the issue of benefits at the employee meeting, he explained that in light of the collective-bargaining process, no guarantee could be given that the paid vacations, 401K plan, or overtime pay the workers currently received would survive. The Respondent argues that BF's comments were not threats, but a realistic statement of fact since the Sheet Metal Workers' master agreement contained no parallel provisions.

No other witness, including employees who had worked for the Respondent for many years and remained on its payroll at the time of the instant trial, supported BF's assertions; not one worker or manager suggested that he referred to the loss of benefits in the context of collective bargaining. Crediting the account of witnesses who had much to lose by controverting their employer's testimony, I doubt that BF carefully tied the loss of benefits to the give and take of collective bargaining. It is far more likely that he warned the employees in no uncertain terms that they would lose their benefits if they chose union representation, and thereby committed another egregious unfair labor practice. See *Medical Center of Ocean County*, 315 NLRB 1150, 1156 (1994).

[9] Subpar. 5(b)(iii) of the complaint appears to duplicate par. 5(b)(1). Therefore, they will be treated as a single allegation.

[10] Subpar. 5(b)(iii) appears to refer to the same incident alleged in par. 5(b)(1) and, therefore shall not be treated as a separate allegation.

[11] See, e.g., *Comcast Cablevision*, 313 NLRB 220, 224 (1993), and cases cited therein.

5(d)—Chadd Feldkamp creates impression of surveillance

Henderson testified that early in May, he urged approximately 20 of his fellow workers to sign union authorization cards. However, he also stated that he had not engaged in such activity in the presence of supervisors, nor had he openly displayed union insignia. Thus, there was no ostensible reason for Chadd Feldkamp to tell Henderson at the May 11 meeting that, "We know how you're gonna vote." Chadd's remark gives rise to a justifiable belief that he knew of Henderson's union leanings because he had been the subject of surveillance. Where, as here, a respondent creates the impression of having engaged in surveillance, a finding is in order that Section 8(a)(1) was violated. See *Tartan Marine Co.*, 247 NLRB 646 (1980).

(5)(e)(1) and (11)—McDonald threatens mass terminations and business closure

Both Henderson and Sipple reported that during a company meeting early in May, Superintendent Mike McDonald muttered loudly enough to be overheard by a number of nearby employees, that "We ought to f—kin fire them all and start over, this is a bunch of bull shit." (Tr. 287.) Little needs to be said about his crude remarks. They amount to a coercive threat proscribed by Section 8(a)(1).

At another point during the same meeting, McDonald interjected that while employed by another company, his coworkers had voted for union representation, but after winning the election, the union had forced the employer out of business. As a result, he found himself on the street with a wife and two children to support.

The Supreme Court's decision in *NLRB v. Gissel Packing Co.*, 395 NLRB 575(1969), is instructive in determining whether comments like McDonald's should be considered the expression of a justifiable belief as to the economic consequences of unionization, or a misrepresentation which conveys a message of intimidation and fear:

> [A]n employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a "threat of reprisal or force or promise of benefit." He may even make a prediction as to the precise effects he believes unionization will have on his company. In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control.[12]

McDonald was implying, of course, that since unionization was responsible for forcing his former employer to close its doors, a union victory would produce the same result for Feldkamp. To paraphrase *Gissel*, McDonald was "free to predict plant closure only if the prediction is capable of proof" and the "likely economic consequences of unionization . . . are outside his control." Id. McDonald failed to offer any proof to support his insinuation. Therefore, his ungrounded message must be viewed as a coercive scare tactic violative of Section 8(a)(1).

[12] Id. at 618–619.

5(f)—The senior Feldkamp threatens job loss

Fraley further testified that James Feldkamp Sr., founder of the predecessor business, repeated BF's contention that "the older guys would come in and take our jobs, and we would be on the books." (Tr. 25.) Having determined above that the senior Feldkamp was the Respondent's agent, his statement constitutes a threat cognizable under Section 8(a)(1) of the Act.

5(a)(i), (ii), and (iii)—Thompson's threats to Fraley of job loss

When the May 11 meeting concluded, Fraley joined a small group of men milling about. One of them, Superintendent Bill Thompson, asked him if he did not have some relatives working for Feldkamp. Answering his own question, Thompson observed that Fraley's brother, brother-in-law, and several nephews were on the Respondent's payroll. He then commented pointedly that Fraley had been around a long time but how much longer he remained was up to him. Later that same evening, Fraley telephoned Thompson to advise him of his strong support for the Union. Unsurprised, Thompson told Fraley that his prounion posture was no secret.

Since Thompson did not testify, his remarks, as related by Fraley, are undisputed. It is abundantly clear that the superintendent's comments were thinly veiled threats cautioning Fraley to alter his support for the Union if he and his family members wanted to continue working for the Respondent. Thompson's threat to Fraley's employment was intimidating in its own right. When coupled with threats to the continued employment of four of Fraley's family members, Thompson's questions and answers were unmistakably alarming.

5(b)(iv)—BF promises Fraley a pay raise if the Union is rejected

Some 4 days after the May 11 meeting, while BF was touring a jobsite, Fraley told him why he was supporting Local 24. In particular, he pointed out that under a union contract he would receive higher wages; moreover, he knew of no nonunion firm that would pay him $16 an hour, a dollar more than his current wage rate with the Respondent. According to Fraley, BF reacted by suggesting that the Company might grant him such a raise, but then added that he could not do anything until "this is all over." Fraley understood "this" as a reference to the forthcoming union election. BF offered a different version of this exchange, testifying that he told Fraley there was no reason he could not earn $16 an hour at Feldkamps, but did not promise anything.

On more than one occasion, I have decided that BF recast and tempered his testimony to ensure that his out of court statements would conform to legal requirements. Having recast his words once too often, I now find it difficult to credit any of his testimony when it concerns his responsibility for committing an unfair labor practice act. Accordingly, I credit Fraley's account of this incident, and find that BF implied that he would give Fraley a raise if the Union was rejected. Thus, BF found a cunning way to promise Fraley a future raise without giving it to him by casting blame on the Union. The purpose of this ploy was to persuade Fraley to withdraw his support for Local 24. See *Suzy Curtains*, 309 NLRB 1287, 1298 (1992).

5(b)(vi)—BF threatens job loss at May 31 meeting

At the third employee meeting on May 31, BF displayed charts and graphs depicting the various types of work the Respondent performed, and the percentage of the total business each type of work represented. Against this backdrop, he described how unionization would affect the business. Based on a synthesis of consistent and credited testimony offered by Fraley, Steele, Henderson, and Parriman, BF told the employees that the Respondent would lose 30 percent of its business, that it could not compete if compelled to pay union rates for "Mom and Pop" work; consequently, the Company's business would decline and employees would lose their jobs.

Like the employer in *Triec, Inc.*, 300 NLRB 743, 748 (1990), BF specifically announced the type and amount of business the Company would lose if the Union prevailed. As in *Triec*, his pessimistic forecast was not "carefully phrased on the basis of objective fact." Id. Rather, BF used his bully pulpit to deliver his claim as if it were a scientific truth, which it was not. In so doing, he overstepped the bounds of protected speech and unlawfully interfered with the employees' Section 7 rights.

5(b)(vii)—The Respondent grants an improved term of employment

Employee Tom Sipple testified that during the second employee meeting on or about May 18 he and some of his coworkers asked BF if the paychecks could not be distributed in some other manner than by mail. At another time, Fraley delivered much the same message to the company president, explaining that the checks often arrived on unpredictable dates.

BF responded to these comments with alacrity, announcing at the third employee meeting on May 31 that the Company was revising its policy so that employees would be able to collect their paychecks on Thursdays between 4 and 5 p.m. Sipple maintained that this was the first time in his 5 or 6 years of employment that BF had changed a policy affecting the entire work force.

The Respondent argues that the change in the method of distributing paychecks was an inconsequential change, a minor matter of longstanding concern to the employees which was easily and rapidly corrected. There's the rub. BF admittedly knew for some time that the employees were dissatisfied with the manner in which their wages were paid; he assuaged their concerns with little effort. Why, then, did he wait until the union campaign was in high gear? Two answers to this question present themselves: the Respondent altered the way the workers received their wages (1) in order to please them and promote feelings of loyalty and gratitude, and (2) to demonstrate that the Respondent, not the Union, controlled their wages. Given the timing of BF's actions, it is fair to infer that he finally altered the method of paying wages because he recognized that the change mattered to the men and it was important that he ingratiate himself to them. Therefore, unilaterally altering the way in which the employees received their wages was not a de minimus act, but a benefit which was likely to interfere with the employees' free choice in deciding whether or not to approve union representation.

If the Respondent had a standing practice of receiving and remedying employee complaints, then no objection could be raised if the method of distributing wages was altered, by coincidence, during the union campaign. However, the Respondent did not typically solicit or rectify employee grievances. Therefore, by responding rapidly to the employees' desire to be paid in a different way, when their discontent with receiving checks by mail had been ignored prior to the union campaign, reveals the Respondent's interest in indulging the employees in order to unduly influence their exercise of Section 7 rights. See *Carbonneau Industries*, 228 NLRB 597 (1977).

5(b)(viii)—The Respondent denies pay raises to discourage union activity

Employee Tom Sipple approached BF sometime in July and asked for a pay raise to which he believed he was entitled by reason of his completing a training program. BF told Sipple he could not accommodate him while the Union stood in his way. Similarly, Tom Bucher also spoke to BF about a raise in July. BF agreed that Bucher deserved the pay increase since he was overseeing a job at that time, not just working on one. However, he told Bucher that his attorney had advised him to withhold such actions until the "union activity was all straightened out." (Tr. 250–252.)

An employer may not grant a pay raise to its work force during a union campaign to ingratiate itself with the employees and woo them away from supporting a union. By the same token, an employer may not withhold a wage increase which would have been awarded whether or not a union was on the scene. Therefore, BF had no reason to withhold pay increases to which Bucher and Sipple apparently were entitled. To deny their requests and blame the denial on the Union, interferes with and restrains employees in their exercise of Section 7 rights. See *Wellstream Corp.*, 313 NLRB 698, 706–707 (1994); *Suzy Curtains*, supra at 1298.

5(c)(1)—Supervisor Howard threatens service department closure[13]

It is undisputed that Service Manager Richard Howard interrupted the May 31 meeting with the alarming assertion that the service department would close if the Union prevailed. Fraley acknowledged that BF quickly admonished Howard, telling him that "they could not say that." (Tr. 36.)

While conceding that Howard blurted out that the service department would close, BF noted that he swiftly repudiated his remarks, assuring the assembled workers that Howard's statement was "not true. We could not—there's no way we could say anything like that. . . . I went on to say that the service rate would be higher. But I . . . told everyone that what Rick said was not correct." (Tr. 433.)

An employer may rid itself of liability for unlawful conduct by repudiating the conduct. However, the Board insists that to be effective, a disavowal must be timely, unambiguous, specific in nature to the coercive conduct, free from other proscribed illegal conduct and given with assurance that the Respondent will not interfere with the employees' exercise of Section 7 rights. *Passavant Memorial Area Hospital*, 237 NLRB 138–139 (1978).

[13] Par. 5(c)(vi) appears to duplicate par. 5(c)(1) and, therefore, will not be treated as a separate allegation.

BF's effort to repudiate Howard's threatening remark does not meet the *Passavant* standards fully for he gave no assurance that the employees could pursue their organizational rights without further intrusion, nor did he cease committing other unlawful acts thereafter. Consequently, the Respondent remains liable for Howard's frightening outburst.

5(g)—McDaniels confirms threat of business closure should the Union prevail

Fraley further testified that following the second plantwide meeting held on or about May 18, Mike Huckey, an estimator for the Respondent, urged him to vote against the Union and to refrain from speaking at meetings. Huckey confided to him that although BF was not permitted to divulge his true intentions to the employees, he would close Feldkamp's doors in the event of a union victory. (Tr. 32.) Fraley stated that McDaniels confirmed Huckey's threatening remarks.

Although McDaniels testified at the instant hearing, he said nothing to contradict Fraley's testimony that he had agreed the plant would close if the Union succeeded in its organizing drive. This incident has a particularly threatening quality because they disclosed BF's intentions as if they were revealing a confidence or delivering inside information. Having found that McDaniels is a supervisor under the Act, it follows that the Respondent bears responsibility for his intimidating contentions.

5(c)(iv) and (v); 5(e)(iii) and (iv)—Howard and McDonald threaten job loss and interrogate Bucher

Tom Bucher testified, without contradiction, about two incidents, both of which took place in June while he was assigned to a job at a local airport. On one occasion, while he was working with helper Steve Mitchell, Service Department Chief Howard came on the scene. He declared, as he had at the May 31 meeting, that he would lose money in the event of a union victory and would have to fire all the service employees. He then asked Bucher how he planned to vote in the forthcoming election. Although Bucher had taken no public position either for or against the Union at that time, he answered that he would vote against the Union.

Bucher described a similar exchange with Superintendent McDonald at the same jobsite and in the same month. After talking about the Union all morning, McDonald told Bucher he could not understand why the employees would support the Union since "they [the Company] closed the doors once before, [and] . . . would do it again." (Tr. 248.) When McDonald also asked how he would vote in the election, Bucher offered the same reply he had given Howard; that is, that he planned to vote "no."

At this time, Bucher had not taken a public position vis-a-vis the Union. Therefore, McDonald's and Howard's questions to him, accompanied by threats of job loss and plant closure, amounted to unlawful interrogation[14] and intimidation in violation of the Act.[15]

[14] See *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985), and *Rossmore House*, 269 NLRB 1176 (1984).

[15] *Guardian Industries Corp.*, 313 NLRB 1275, 1277 (1994), and *Triec, Inc.*, supra at 748. By repeating the very threat which BF had attempted to disavow at the May 31 meeting, Howard's threat on this occasion was both willful and egregious.

5(c)(ii), (iii); 5(h)(i), (ii), and (iii)—Threats and alleged surveillance at union meeting

On June 8, Union Business Agents Joe Zimmer, Tom Murray, and Dick Scott met with approximately 20 rank-and-file employees at St. Michael's Hall, a building diagonally across the street from the Respondent's service department. The union representatives outlined the wage rates and benefits provided under a union contract which, Fraley observed, were higher than those employees earned from the Respondent.

Several Feldkamp officials—namely, Rick Howard and Guy DeWald—also attended the meeting, purportedly because their names were included on the Respondent's eligibility list which the Union used to distribute notices of its meeting. Superintendent Bush also attended after receiving an oral invitation to the meeting from Zimmer who had no idea who he was. They indicated that they were interested in learning more about the Union's positions.

Apparently bent on disrupting the meeting, DeWald peppered the union agents with questions. At one point, he called out, "Is anyone in this meeting stupid enough to believe that BF's going to sign a contract?" (Tr. 38.) Fraley insisted that BF would agree to a collective-bargaining agreement, but Dewald stated categorically that "BF would close the doors. There's no way he would sign no contract [sic]." (Tr. 38.)

Coincidentally, the union meeting hall was less than a block away from the main entrance of the Respondent's facility. Fraley and several others who had attended the meeting, remained after the meeting concluded and subsequently assisted Zimmer load materials into his car. At that time, Fraley noticed Service Manager Howard, standing outside his office for a considerable period of time, apparently watching the men who had emerged form the meeting hall.

The complaint alleges that Howard, Bush, and DeWald were engaged in unlawful surveillance when they attended the union meeting. The fact that they were invited to attend the meeting does not necessarily make their presence there lawful since the invitations were issued to them inadvertently. Moreover, notwithstanding their claims to the contrary, it would be naive to assume they were present for any legitimate reason, as they asserted. They apparently knew all they wanted to know about the Union which was enough to cause them to oppose it. DeWald's motive for attending was to heckle and disturb the speakers and members of the audience. Even if this trio entered the meeting with technically proper invitations, this does not grant them the right to remain when their purposes were antithetical to those of the host Union. However, after learning who they were, no one asked them to leave. By failing to do so, the Union tacitly acquiesced to their continued presence. See *Osco Drug*, 237 NLRB 231, 234 (1978). Under these circumstances, it cannot be said that the Respondent's agents were engaging in unlawful surveillance by attending and remaining at the Union's June 8 meeting. Accordingly, I shall recommend dismissal of the allegation that they were engaged in unlawful surveillance.

DeWald, who, as found above, meets the statute's definition of a supervisor, did not deny making the intrusive statements attributed to him by several employees who were at that meeting. Accordingly, it is an easy task to find that he threatened the employees with job loss and suggested that

voting for the Union would prove futile since the company president would never sign a collective-bargaining agreement.

The complaint further alleges that Howard engaged in unlawful surveillance when he appeared to be watching some employees emerge from the meeting at 10 p.m. However, this is the very meeting Howard just had attended. He had no need to survey a few employees who stayed on after the meeting, when he had an opportunity to observe, unencumbered, all the employees who were plainly visible during the meeting. Moreover, it was after 10 p.m. when Fraley thought Howard was watching them; yet, no evidence was offered as to the extent of visibility at that time. Therefore, I am unconvinced that the General Counsel has presented sufficient proof that Howard was engaged in unlawful surveillance at that time and shall recommend dismissal of this allegation as well.

5(b)(ix), (x), and (xi)—Threats regarding union labels on hard hats

Employee Jerry Steele testified that in November 1995, BF approached him on the jobsite and, noting that Steele was wearing a hard hat adorned with a union decal, asked where he obtained it. When Steele replied that it had been given to him by Union Agent Zimmer, BF asked if Zimmer signed his paycheck.

A few weeks later, BF made sure that Steele was given a new hard hat with a Feldkamp label affixed to it. Steele accepted the hat but pasted another union emblem on it. Several weeks later, when BF saw Steele wearing the new hard hat with the two labels, he commented to Steel and another employee whose hard hat also bore a union sticker that it made no sense to wear both. Steele testified that before he received the company hard hat, he knew of no rule, which compelled employees to wear Feldkamp labels and had worn his own without comment from management.

BF did not question Steele about the source of the union sticker, nor comment about the incongruity of wearing both a union and company label out of idle curiosity or a search for information. Rather, taken in context, his comments conveyed disapproval of Steele's display of support for the Union. As such, they were coercive attempts to discourage union activity.

D. *8(a)(3) Violations*

As detailed below, the complaint alleges and the General Counsel maintains that the Respondent violated Section 8(a)(1) and (3) of the Act by (a) issuing a warning to and then terminating Hayes Steele, ostensibly because of his poor attendance record and (b) issuing disciplinary warnings to Fraley for discriminatory reasons. The Respondent submits that the actions taken with respect to both employees were based on legitimate considerations that had nothing to do with their union activity.

6(a)—The Respondent discharges Hayes Steele because of his union activism

Hayes Steele began working for the Respondent in July 1993 after his uncle, Ray Fraley, recommended him to Superintendent Thompson. Fraley maintained that he informed Thompson at that time that Steele was his nephew. Steele joined a veritable family circle when he began working at Feldkamps for he was related not only to Fraley, but also to Tom Sipple, his stepfather, another uncle, Lonnie Fraley, and his brother, Jerry Steele.

Steele was an early advocate of the Union. He attended and signed an authorization card at the first union meeting in March 1995. He also distributed union literature and authorization cards to other employees who had not attended that meeting, and made a point of discussing union matters with all of his coworkers. He did not openly identify himself as a union supporter until May when he affixed a union emblem to a lunch box which bore his name and was stacked openly at the same spot where the other employees typically stored their boxes. Steele also was a member of the union organizing committee and consequently attended numerous meetings, including the infamous one on June 8 at which he sat in the row just in front of the Respondent's three supervisors.

Steele began having mechanical problems with his car in midsummer which caused him to arrive late to work. To deal with this situation, he asked BF, as well as Supervisors Thompson and McDonald, if he could transfer to a jobsite which would permit him to travel to work with his stepfather. BF stated that he had to deny Steele's request because no work was available for him elsewhere.

The Respondent has no written rules governing tardiness or absenteeism, but BF stated that the Company's unwritten policy requires employees to contact someone in authority if they are unable to work or will arrive late. Steele claimed that he generally tried to comply with this policy. The record contains a note that he called in on at least once or twice, but failed to do so a number of other times. However, BF conceded that the Respondent's records were far from perfect in reflecting whether an employee called in to give notice of a late arrival or absence.

BF explained that he seldom becomes involved with attendance matters unless a problem is brought to his attention. Thus, he was not concerned with Steele's attendance record until Superintendent McDonald complained that Steele had not appeared at a jobsite where he was greatly needed to work on a crane with a coworker, Bucher. BF indicated that Steele's failure to appear at the proper place on the day a rented crane was to be used on the job, was costly to the Respondent. In truth, another employee, not Steele, was assigned to work with the crane and failed to show up on the appointed day.

BF further stated that while inspecting a project in September, the job foreman, Ernie Cornelius, informed him that Steele often was late to work. After reviewing his timecards, BF issued Steele a written warning dated September 21, which noted that he had been late 13 times between the weeks ending on August 21 and September 17. (The timesheets indicate that Steele missed from one-half to 2 hours' work on each of these occasions.) The notice cautioned that "the next time you are absent from work for any reason other than an illness . . . or an injury, you will be terminated." (G.C. Exh. 15.) When BF hand delivered the warning, he urged Steele to alert someone at the facility if he had to be late or absent. At this point, Steele explained that his problem was due, in part, to having to chauffeur his daughter to school. However, he assured BF that he knew what was expected of him.

Soon after receiving the attendance memo, Steele met with BF for an evaluation review. Steele testified without dispute that during the session, BF repeatedly asserted that Feldkamp ran the Company; that no one else had or would. The message BF sent was, in substance, that Respondent had no intention of granting the Union any role in negotiating terms and conditions of employment. Steele received a 25-cent-an-hour raise, much less than the $1 he received in each of his previous raises.

Over the next 5 weeks following his receipt of the September 21 warning, Steele accumulated four new attendance violations—his timesheets indicate that he worked 7 rather than 8 hours on October 4, missed 15 minutes on October 6, neither called in nor worked on October 10, on October 23, again logged only 7 hours.

Following Steele's absence on October 10, BF went to his worksite intending to fire him but found him quite ill. Moreover, Steele told him he thought his wife had called to report his absence. In these circumstances, BF decided not to take any action. On October 31, while signing paychecks, BF noted that Steele had missed an hour of work the previous week and paged him at his jobsite to discuss the matter. Steele admitted he had been late but explained that his car had overheated. Evidently not impressed with this excuse, BF fired him. Later that day, BF approached Fraley at his worksite and told him he regretted having to discharge Steele. Fraley asserted that BF specifically stated that he had dismissed his nephew. BF denied this, insisting that he was unaware of any relationship between the two. He also denied knowing that Steele had engaged in any union activities.

The General Counsel and the Charging Party contend that BF discharged Steele because of his union sympathies. The Respondent insists that BF terminated him solely because he had an abysmal attendance record and refused to comply with company policy by notifying someone in authority that he would be late or absent.

Where, as here, dual motives are offered to explain a respondent's decision to discipline an employee, the Board has formulated a burden shifting test to evaluate the evidence. First, the General Counsel must establish a prima facie case, showing by a preponderance of the evidence that the employee engaged in union or protected concerted activity, that the respondent knew of that activity, and acting out of antiunion animus, disciplined the employee because of his union predilections. If the General Counsel succeeds in presenting sufficient evidence to meet its burden of persuasion, then an inference arises that the employee's protected conduct was a factor which motivated the employer's response. *Wright Line*, 251 NLRB 1083, 1088 (1980).[16] The burden then shifts to the respondent to prove that the employer would have meted out the same discipline even if the employee had not engaged in union or protected concerted activity. Id. The General Counsel has presented sufficient evidence in this case to meet its *Wright Line* burden.

Steele's testimony regarding his extensive involvement In the union campaign was not rebutted. The Respondent's efforts to undermine the General Counsel's prima facie case rests on a different plank. Specifically, the Respondent contends that BF was unaware that Steele was a union adherent and actively engaged in organizational activity when he discharged him. The Respondent's defense is difficult to swallow.

BF frequently toured the jobsites so it is likely that he had occasion to see the union emblem on Steele's lunchbox. If he did not see it, surely one of the Respondent's supervisors did. Given management's overt hostility to the Union's organizational efforts, any supervisor who spotted Steele's lunchbox bearing a union label, would certainly report that fact to the Feldkamps. Moreover, Steele was present at the union meeting attended by the Respondent's supervisors. Can there be any doubt that the three antiunion men who appeared at the June 8 meeting told BF exactly who was there?

Further, BF appeared to be a hands-on manager; he toured the jobsites frequently and seemed to have an easy and informal relationship with his staff. He also revealed that he knew a great deal about his employees. For example, he was aware that one employee faced a particular hardship in his personal life; he also was familiar with another employee's penchant for habitually calling in when he was going to be absent, even though he said he did not become involved in such matters. I am certain he also knew that Fraley, an outspoken union advocate, was Steele's uncle, which explains why he would take the unusual step of informing him of Steele's discharge. Feigning ignorance of Fraley's and Steele's relationship and of Steele's union sympathies, BF claimed that he informed Fraley of Steele's dismissal only because he knew that Fraley had recommended him for a position with the Company. But Fraley had not spoken to BF about his nephew in 1993, but to Superintendent Thompson. If BF could recall that Fraley had recommended Steele for a job in 1993, he surely knew of their family relationship by the time he fired Steele in 1995.

Why would BF bother to deny such knowledge? One plausible explanation is that by denying awareness that Steele and Fraley, a key union proponent, are related, he could more easily claim that he had no knowledge that Steele, like his uncle, was involved in union activity, or that such activity had anything to do with Steele's disharge. Alternatively, or perhaps in addition to the preceding explanation, BF may have believed that in firing Steele, he could accomplish a dual purpose: rid the Company of a union agitator and, at the same time, discourage Fraley's support for Local 24 by showing him what can happen to union adherents. As the Court of Appeals for the Seventh Circuit observed: "To retaliate against a man by hurting a member of his family is an ancient method of revenge, and is not unknown in the field of labor relations." *NLRB v. Advertiser's Mfg. Co.*, 823 F.2d 1086, 1088 (7th Cir. 1987), cited with approval in *PJAX*, 307 NLRB 1201, 1203 (1992). Based on the foregoing considerations, I conclude that the General Counsel has established a prima facie case.

Accordingly, the burden shifts to the Respondent to prove that BF would have fired Steele even in the absence of his union activity. *Wright Line*, supra. To this end, the Respondent claims that Steele had an appalling attendance record, was warned in September that he would be discharged if he continued to miss work and was, in fact, terminated on October 31, after he failed to give notice that he would be an hour late the week before. The Respondent introduced documentary evidence showing that it had discharged other em-

[16] Enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

ployees with poor attendance records problems in a similar manner even though they had no affiliation with the Union.

To be sure, Steele's attendance record would not win praise or prizes. However, the record shows that other employees were not warned until they had compiled far lengthier absentee records than Steele's. Further, even after being warned, their absenteeism continued to an extent far in excess of Steele's; yet, they remained on the Respondent's payroll at the time of the instant trial. See, for example, timesheets introduced into evidence for employees Steve Rebholz, James Goad, Jerry Slageter, Jay Thompson, and Kenneth Salyers (G.C. Exhs. 17, 19, 20, 22, and 23, respectively).

To justify retaining such errant employees while discharging Steele, the Respondent claims that no one, other than Steele, consistently refused to provide notice of an absence or late arrival in defiance of company policy and contrary to BF's direct orders. When asked if "any other Feldkamp employee ever refused to call in after he was directly asked to do so," BF replied, "No . . . he knew what was expected of him. And he just continually *refused* to do what I asked." (Emphasis added.) (Tr. 559–560.) In its brief, the Respondent stresses Steele's "abject refusal to follow company policy" more than once as a factor which reinforced the propriety of his discharge.

The Respondent's claim that Steele was the only employee to willfully violate its call-in policy has no basis in fact. BF admitted, and the documentary evidence discloses, that the Company did not keep careful records of such matters.[17] Thus, reliable proof is lacking which might establish who called in and who did not. When, on rare occasions, an employee's failure to call in was noted, no disciplinary action was taken. The Respondent simply did not enforce its no-call rule, that is, except in Steele's case.

To prove that Steele was not treated in a disparate manner, the Respondent listed a number of employees who allegedly were terminated for absenteeism who had no connection with the Union. A review of their timesheets suggests that for most of them, significant differences distinguish their attendance records from Steele's. For example, Rodney Bales was laid off, not discharged, and it had nothing to do with his attendance record. Rather, the workload had diminished and Bales, who was employed by the Respondent for a little over 2 months, was the logical person to be laid off. The record suggests that Bales also may have had a psychological problem. A warning notice in Donald Mason's file stated that he was late or missed time in 23 of the last 24 weeks. After receiving this warning, Mason lasted no more than 3 weeks, working only 36, 31, and 12 hours, respectively throughout that period, thereby indicating that he had little interest in mending his ways. Gilbert Horsley was on the Respondent's payroll for a period of only 2 months. During that time, he managed to work a full, 40-hour week only once. Similarly, Lloyd Van Nest was employed for no more than 1 month, and Chris Horan for 2 months. Both men completed only one 40-hour week during their brief periods of employment.

[17] See, e.g., timesheets for Goad which were signed by Supervisor McDaniels. Employees were supposed to contact McDaniels if they were going to be late or absent, yet nothing appears on the timesheets to indicate that such calls were made.

In almost every case, the individuals mentioned in the paragraph above, very quickly demonstrated that they were unreliable in terms of their attendance from beginning to end of their brief periods of employment with Feldkamp.[18] In contrast. Steele worked for the Company for 2 years and was considered a good worker before the Respondent began to keep a watchful eye on his attendance. On the evidence adduced here, the Respondent cannot claim that it treated employees with extensive histories of absenteeism and tardiness but who were not recognized union sympathizers, in the same way it dealt with Steele. The Board has long regarded an employer's disparate and adverse treatment of a union adherent as evidence which may give rise to an inference of discriminatory intent. See, e.g., *PJAX*, supra at 1209. Such an inference is warranted here.

Moreover, the record in this case does not support the Respondent's contention that Steele expressly and willfully refused to call in, or defiantly spurned company policy. He asserted that he did call in on occasion, but since such calls usually were not recorded, especially before the union campaign heated up, there is no way to prove or disprove his claim. Beginning in July 1995, shortly after the Union filed the first unfair labor practice charge in this case, the Respondent began taking the unusual step of renoting the times Steele did not call in. There is no evidence that the call-in habits of other employees who had not evidenced a union affinity, were scrutinized similarly. While Steele did not explain his failure to contact the Company when he was delayed in coming to work, he offered BF an explanation for his tardiness after the fact, and in a conciliatory manner.

BF would not win medals for his handling of administrative affairs. No set of written rules governed employee absenteeism and tardiness. BF acknowledged that he became involved in such concerns only when a supervisor brought a problem to his attention. His own supervisors made clear that laxity was the rule with respect to enforcing attendance practices or policies. Yet, the company president took the unusual step of keeping notes of his exchanges with Steele, and pounced on one excuse after the other to justify continuous oversight of Steele's attendance. He finally found an excuse to fire Steele, not because a supervisor complained, but atypically, by reviewing Steele's timesheets after signing his paycheck. It would be difficult to estimate how many other paychecks BF signed for workers with appalling attendance records who, nevertheless, remained in the Respondent's employ long after Steele was gone. BF's unusual practices in dealing with Steele's tardiness suggest that he was preparing a paper trail in anticipation of trial.

It is true that Steele missed hours of work, but the Respondent has failed to prove that his tardiness was the cause rather than the excuse for giving him the September 21 written warning and discharging him on October 31. It follows that the Respondent has failed to meet its burden of proving that Steele would have been discharged even in the absence of his union activity and that in firing him for discriminatory reasons, the Respondent violated Section 8(a)(1) and (3) of the Act.

[18] They may have been unsatisfactory employees in other respects since uncharacteristically, the Respondent quickly discharged them.

6(b) and (d)—The Respondent disciplines Fraley for discriminatory reasons—the Slageter incident

In early September, Fraley advised apprentice-employee Jerry Slageter that he was entitled to journeyman's pay for work he had performed while assigned to a government job which paid workers at the prevailing wage rate. Some 3 or 4 weeks later, when Fraley and Slageter found themselves working together again, Slageter told Fraley and the job foreman, Parriman, that after he had asked about his right to receive journeyman's pay, he was reassigned to the shop. He then asked how he could obtain the money the Respondent rightfully owed him. Fraley suggested that he contact a union representative. The matter did not end there, however, for Slageter continued to ply Fraley with questions as to how he could get paid for the prevailing rate job and how much he was owed.

Later that week, Slageter contacted BF and asked him to come to the jobsite. BF testified that on his arrival, he found Slageter weeping and distraught, ostensibly because Fraley had harassed him by insisting that he demand higher wages for the government work he had performed.[19] Parriman and Fraley gave BF their version of the exchanges with Slageter. However, the company president continued to blame Fraley for Slageter's agitated condition, suggesting that his conduct must have been egregious if it had reduced Slageter to tears. BF cautioned Fraley that "you can't harass these employees. If they don't want to hear about the union then you can't tell them." (Tr. 305.) He warned Fraley that if it happened again, he would suspend him for 3 days without pay. (Tr. 51–52; 304–305.)

A few weeks later, during his evaluation interview, BF told Fraley that he had a problem with his attitude, which he tied to Fraley's role in the Slageter incident. Fraley received an hourly pay raise of only 25 cents.

Fraley's encounter with Bush

On November 8, just as Fraley was about to take a break, Union Business Agent Cochran approached him at the entrance to the jobsite and asked if he knew where he could find Hayes Steele. Fraley and Cochran began leaving the jobsite together when the foreman, Rob Bush, returned from his break. First, he asked Cochran if he had signed in; then he ordered him to leave.

Fraley explained that he was just leaving for his break, but Bush gave little weight to this fact, insisting that, "You can't be talking to no union man . . . when you're getting paid." (Tr. 5.) When Fraley took issue with the foreman's position, Bush became belligerent. He began cursing and roughly poked Fraley's chest with his fingers.

Fraley reported the foreman's conduct to Superintendent Kevin Bush, who is related to the foreman, Kevin Bush. At the end of the day, when Fraley complained to BF about the foreman's misconduct, he promised to conduct his own investigation.

On November 13, much to Fraley's chagrin, BF handed him a written warning which branded him "the aggressor in a jobsite confrontation." The warning also stated that since this was "the second such incident you have been a part of in the past six months . . . [f]uture incidents will result in your immediate discharge." (G.C. Exh. 2.) In contrast, BF prepared a mild, almost apologetic note to Foreman Bush, assuring him:

> You were not the aggressor and perhaps were the victim of harassing and inappropriate behavior. Nevertheless you responded by "poking" or pointing with your finger. No such behavior can be tolerated . . . . Future incidents will result in discipline up to and including discharge . . . . I regret the tenor of this notice. [G.C. Exh. 9.]

BF testified that he regarded Fraley as the aggressor in the encounter with Bush, surmising that he provoked the foreman's reaction by challenging his judgment about proper break procedures. He reached this conclusion because Fraley had acted irresponsibly with Slageter, harassing him to such an extent that he broke down and wept. In other words, in bootstrap fashion, BF decided that since Fraley harassed Slageter, he also must have harassed Bush and thus, was responsible for the outcome in both situations. This attempt to hold Fraley accountable for the misconduct of others is unjust and unlawful.

BF conveniently failed to consider an important factor in faulting Fraley for Slageter's reaction—until cross-examination, he omitted mentioning that Slageter was an emotional individual, one who "can't take a lot of pressure." (Tr. 571–572.) It is likely that Slageter's distress on the jobsite as BF described it, was caused by his own fragile temperament rather than any external provocation. BF admitted knowing about Slageter's temperament. Yet, without giving the slightest credence to Fraley's and Parriman's consistent accounts that Slageter initiated the conversations about his entitlement to certain wages and persisted in questioning Fraley about this, BF declared Fraley the provocateur. Relying on the word of an emotionally charged individual, rather than the accounts of two steadfast employees who corroborated each other, indicates that BF was determined to find that Fraley was the wrongdoer, regardless of the truth. From one unfounded conclusion, BF leaped to another—that because Fraley purportedly provoked Slageter, he also must have provoked Bush.

BF's explanation for finding Fraley at fault in the Slageter incident is far-fetched. But credulity is strained beyond the breaking point when he relies on Fraley's supposed harassment of Slageter to conclude that he must have provoked Foreman Bush as well. Indeed, BF's reasoning is so preposterous as to cast great doubt on his candor and lead to the conclusion that his excuses were pretextual, designed to mask his patently discriminatory motives. See *Limestone Apparel Corp.*, 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982). In short, BF hoisted himself on his own petard by offering a ludicrous explanation for issuing a warning to Fraley when the real reason was to penalize him for his stalwart support of the Union.

The Respondent submits that this incident is too trivial to warrant attention as a violation of the Act. It is true that Fraley was not suspended or discharged. However, if the Respondent succeeded in blaming Fraley for incidents he did not provoke, what would prevent issuance of a third warning discharging him for equally spurious reasons. I find nothing

[19] The record indicates that employees assigned to work under government contract were supposed to be paid the prevailing area rate which was greater than the hourly rate the Respondent paid for nongovernment work.

trivial about these warnings or the discriminatory motives propelling them. Consequently, I find that the Respondent violated Section 8(a)(1) and (3) of the Act in issuing warning notices to Fraley for his role in either the Slageter or Bush incidents.

As noted above, the consolidated complaint was amended to allege that the Respondent promulgated an unlawful no-solicitation rule proscribing communications about the Union or with a union representative during working hours, including breaktimes. This overly broad rule prohibiting employee solicitation during nonworking hours, is unlawful. *Ford Motor Co.*, 315 NLRB 610, 612 (1994).

CONCLUSIONS OF LAW

1. The Respondent, Feldkamp Enterprises, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Sheet Metal Workers International Association, Local Union No. 24, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. Guy DeWald and Larry McDaniels are supervisors within the meaning of Section 2(11) of the Act, and James Feldkamp Sr. is an agent of the Respondent within the meaning of Section 2(13) of the Act.

4. The Respondent violated Section 8(a)(1) of the Act by:

(a) Interrogating employees about their union sympathies and how they intended to vote in the union election.

(b) Threatening employees that they would lose their benefits and jobs, and that the Company, or departments within the Company, would close or operations cease if they designated the Union as their collective-bargaining representative.

(c) Implying that it would be futile to vote for the Union as the Respondent would never agree to bargain.

(d) Promising benefits to employees if they rejected the Union.

(e) Creating the impression that an employee's union activities were under surveillance.

(f) Promulgating and enforcing a no-solicitation rule that prohibited employees from discussing the Union during nonworking time.

(g) Impliedly promising Ray Fraley a pay raise and then withholding it on condition that he withdraw his support from the Union.

(h) Threatening an employee with the loss of employment for himself and family members if he continued to support the Union.

(i) Granting employees an improved term of employment by changing the method of distributing their paychecks.

(j) Denying pay raises to employees in order to discourage their support for the Union.

(k) Requiring an employee to remove his hard hat bearing a union label and replace it with a hard hat on which the Respondent's emblem was affixed.

5. The Respondent violated Section 8(a)(1) and (3) of the Act by:

(a) Warning employee Ray Fraley verbally and in writing that he may not discuss union matters with others during his nonworking time.

(b) Warning and then discharging employee Hayes Steel because he supported the Union.

6. The unfair labor practices set forth above affect commerce within the meaning of Section 2(6) and (7) of the Act.

7. The Respondent has not violated Section 8(a)(1) of the Act, as alleged, by engaging in surveillance during or immediately after the union meeting of June 8, 1995.

REMEDY

On concluding that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act, including posting the notice attached to this decision as an appendix.

Having concluded that Hayes Steele was unlawfully discharged, I shall recommend that the Respondent offer him immediate and full reinstatement to his former job, without prejudice to his seniority or other rights and privileges, and to make him whole for any loss of earnings he may have suffered as a result of the discrimination against him by payment to him of the amount he normally would have earned from the date of his discharge until the date of Respondent's offer of reinstatement, less net earnings, in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 2889 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

I also shall recommend that the Respondents be required to remove from their files any reference to the warnings issued to Ray Fraley and Hayes Steele, and to Steele's discharge, and notify each of them in writing that they have done so, and that they will not use any of these any of these adverse actions against them in any way.

[Recommended Order omitted from publication.]